

1 to court

FILED
HARRISBURG, PA
JUN 22 2004

MARY E. D'ANDREA, CLERK
Per

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

CYNTHIA ANNE DIVEGLIA §
formerly CYNTHIA ANNE KAYLOR §
Plaintiff §
§ Civil Action No. 1 CV-00-1342
v. §
§
NORTHWESTERN MUTUAL LIFE §
INSURANCE COMPANY § *mcl manion ✓*
Defendant § (Judge James McClure)

PLAINTIFF'S MOTION TO ADD EXHIBITS
TO
PRE-TRIAL EXHIBIT LISTING

AND NOW, this 22nd day of June 2004, Plaintiff files this motion to add exhibits to the Pre-trial Exhibit list and in support thereof, avers the following:

1. This matter is a contract action for continuing disability benefits.
2. Pre-Trial of this matter was on June 3, 2004 at which time Plaintiff submitted her list of exhibits as required.
3. Plaintiff had filed two Motions in Limine requesting that certain earnings information be excluded at trial, but this Honorable Court did not rule on Plaintiff's Motions until June 17, 2004, two weeks after Plaintiff was required to submit her exhibits

listing.

4. The Court's adverse ruling on Plaintiff's Motions in Limine allows into evidence yearly earnings information such as W-2 statements. However, benefits under the policy are determined on a monthly basis. Thus, since the court's ruling is based upon the premise that defendant can defend the claim on a partial disability basis (proportionate disability), that determination can only be made if the jury is provided income information of a monthly basis.

5. Plaintiff therefore seeks to introduce into evidence payroll cards and fees earned journal entries for the years 2000-2002, which were provided to defendant on June 10, 2004 and in April 2004.

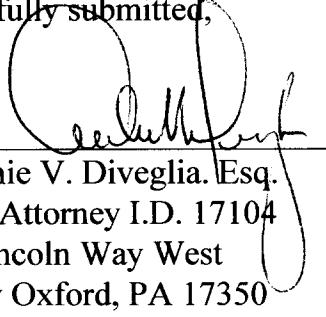
6. Plaintiff did not previously set forth these documents as exhibits based upon her belief that all income documents were not relevant to the singular stated reason for termination of benefits (i.e. lack of medical documentation of disability). Now that the court has ruled adversely to her position and the court is allowing income information to come into evidence, significant prejudice will occur unless the jury receives not only the annual income information, but documents that set forth earnings on a monthly basis, because the policy formula calls for calculations on a monthly, not annual basis. If the

calculations are made on an annual basis, the amount of benefit will be significantly less than if calculated, as call for in the policy, on a monthly basis. Thus, Plaintiff will be prejudiced if annual calculations are averaged rather than calculated on a month to month basis.

7. The defendant does not concur with the filing of this motion as indicated on the Certificate of non-concurrence.

WHEREFORE, Plaintiff requests this Honorable Court to allow her to add to her exhibit list Payroll cards for the years 2000 through 2002 and Fee received journal entries for the same three years.

Respectfully submitted,

By: 

Archie V. Diveglia, Esq.
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New Oxford, PA 17350
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DIVEGLIA AND KAYLOR, P.C.

ATTORNEY IN CHARGE FOR
Plaintiff, Cynthia A. Diveglia

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CYNTHIA ANNE DIVEGLIA §
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CERTIFICATE OF NON-CONCURRENCE
TO
PLAINTIFF'S MOTION TO ADD EXHIBITS
TO PRE-TRIAL LISTING OF EXHIBITS

I Archie Diveglia, hereby certify that I have spoken to Defense Counsel on June 21, 2004, in regard to this motion and he does not concur with the filing of the motion.

Respectfully submitted,

By:

Archie V. Diveglia, Esq.
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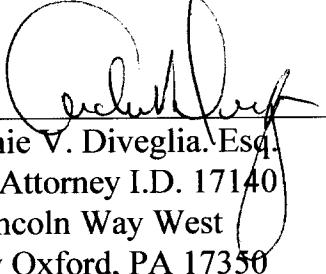
DIVEGLIA AND KAYLOR, P.C.

ATTORNEY IN CHARGE FOR
Plaintiff, Cynthia A. Diveglia

CERTIFICATE OF SERVICE

I, ARCHIE V. DIVEGLIA, attorney for Plaintiff Cynthia A. Diveglia, on this 22nd day of June, 2004, do hereby state that I have served a copy of Plaintiff's Motion to Add Exhibits to Pre-Trial Exhibit List, upon counsel for Defendant by placing a copy of the same in the United States mail, first class, postage prepaid to:

E. Thomas Henefer, Esquire
Stevens & Lee located at
P.O. Box 679
Reading, PA 19603-0679

By: 
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ATTORNEY IN CHARGE FOR
Plaintiff, Cynthia A. Diveglia